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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESUS DAVID CAMPUZANO, Defendant and Appellant.	H045365 (Santa Clara County Super. Ct. No. C1650848)

I. INTRODUCTION

Defendant Jesus David Campuzano pleaded no contest to two counts of committing a lewd and lascivious act on a child under the age of 14 (Pen. Code, § 288, subd. (a)).[1] The trial court suspended imposition of sentence and placed him on three years' probation. On appeal, defendant challenges the probation condition requiring he not "date, socialize or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer." We modify the challenged probation condition and affirm the order of probation as modified.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crimes*[2]

On April 26, 2016, the victim's mother reported that the victim, who was 11 years old at the time, had been molested by defendant the previous year. The victim had told

[1] Unspecified statutory references are to the Penal Code.

[2] As defendant was convicted by plea, the summary of his offense is taken from the probation report, which was based on a report by the San Jose Police Department.

his mother that defendant had touched him inappropriately three times when he was between eight and 10 years old. The victim was interviewed, and he disclosed that defendant had touched him numerous times in the past.

B. *The Plea and Sentencing*

On October 14, 2016, defendant was charged by complaint with two counts of committing a lewd or lascivious act on a child under the age of 14 by use of force, violence, duress, menace, or fear (§ 288, subd. (b)(1); counts 1 & 2).

On June 22, 2017, the complaint was amended on motion of the prosecutor to add two counts of committing a lewd and lascivious act on a child under the age of 14 (§ 288, subd. (a); counts 3 & 4). Defendant pleaded no contest to these two counts with the understanding that he would receive a "three year maximum term subject to the Court's discretion through a Penal Code section 288.1 report." During the hearing on defendant's change of plea, the prosecutor stated that he would seek to dismiss counts 1 and 2 at the time of sentencing. That same day, defendant executed a written advisement of rights, waiver, and plea form. The form indicated that counts 1 and 2 would be dismissed as part of defendant's plea agreement.

On December 1, 2017, the trial court suspended imposition of sentence and placed defendant on three years' probation. As a condition of his probation, defendant was ordered not to "date, socialize or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer." The minutes of the sentencing hearing reflect that counts 1 and 2 were dismissed in accordance with defendant's plea agreement.

III. DISCUSSION

Defendant contends that the probation condition requiring him not to "date, socialize or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer" is unconstitutionally overbroad and

vague due to its use of the term "socialize." He argues that the term should be stricken. Defendant also argues that, to the extent his claim has been forfeited by his counsel's failure to raise it below, his counsel rendered ineffective assistance.

The Attorney General concedes that the condition is overbroad and vague to the extent it uses the term "socialize" and agrees that the term should be stricken.

Before considering the merits of defendant's challenge to his probation condition, we briefly set forth general legal principles regarding raising a constitutional challenge to a probation condition for the first time on appeal.

A defendant may raise for the first time on appeal a facial constitutional defect in a probation condition, where the claim involves " ' "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." ' " (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*); see also *id.* at p. 887.) A facial constitutional challenge to the "phrasing or language of a probation . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court." (*Id.* at p. 885.)

"A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*Sheena K., supra,* 40 Cal.4th at p. 890.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) We review the constitutionality of a probation condition de novo. (*People v. Appleton* (2016) 245 Cal.App.4th 717, 723.)

In this case, we determine that the probation condition imposes significant restrictions on defendant's constitutional right to free association and is overbroad with respect to the prohibition on socializing. A similar condition was found overbroad in *U.S. v. Wolf Child* (9th Cir. 2012) 699 F.3d 1082, 1101 (*Wolf Child*).

In *Wolf Child*, one of the conditions of the defendant's supervised release was that he not " 'date or socialize with anybody who has children under the age of 18' without prior written approval from his probation officer." (*Wolf Child*, *supra*, 699 F.3d at p. 1100, fn. omitted.) In determining that the condition infringed on Wolf Child's right to free association and was overbroad (*ibid*.), the Ninth Circuit Court of Appeals noted, "[t]he prohibited group includes people close to Wolf Child, such as family members, friends, and neighbors who might have children. It would also include a boss or coworker, a sponsor in a support group, or a spiritual leader. The number of people with whom Wolf Child might socialize, knowing them to have children under the age of 18, is indeed vast. For the 10 years of his supervised release, Wolf Child would be required to obtain prior written approval from his probation officer before, for instance, having dinner with [the mother of his oldest child] on a special occasion, or meeting a close family member or friend for coffee, or going to an AA meeting or a tribal function with others seeking to improve their own lives or their tribe's social conditions generally; he might even find himself prohibited from joining his coworkers in the lunch-room or at a social activity sponsored by his employer." (*Id*. at p. 1101.) The *Wolf Child* court went on to say, "It is hard to imagine how Wolf Child would be able to develop friendships, maintain meaningful relationships with others, remain employed, or in any way lead a normal life during the 10 years of his supervised release were he to abide" by the condition that he not date or socialize with anybody who has children under the age of 18. (*Ibid*.) The *Wolf Child* court found the condition "overbroad and thus not

sufficiently limited to achieving the goals of deterrence, protection of the public or rehabilitation." (*Id.* at p. 1100.)

The probation condition imposed in this case is designed to prevent defendant having contact with children. However, the condition prohibits defendant from socializing with people such as family, friends, and coworkers, even though he may never come into contact with their children. A restriction on socializing with *anybody* who has a child under the age of 18, even though defendant may never come into contact with those children, is not carefully tailored to the purpose of the condition. Simply put, it burdens activity that does not raise a sufficiently high probability of harm to governmental interests to justify the interference. Thus, we agree that the term "socialize" should be stricken from the condition.[3]

Accordingly, we will order the challenged probation condition be modified to provide: "The defendant may not date or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer."

IV. DISPOSITION

The probation condition providing: "The defendant may not date, socialize or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer," is modified to read as follows: "The defendant may not date or form a romantic relationship with any person who has physical custody of a minor unless approved by the probation officer." As modified, the order of probation is affirmed.

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[3] The Attorney General also urges us to reject defendant's arguments to the extent he suggests that the terms "date" and "form a romantic relationship" are constitutionally infirm. Defendant, however, does not advance arguments about the constitutionality of these additional terms. Defendant's sole argument on appeal is that "socialize" must be stricken to render the condition constitutional. We further observe that given our conclusion that the term is unconstitutionally overbroad, we do not need to reach defendant's argument that the term is also unconstitutionally vague.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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